Filed 4/24/19 Marriage of Rubin CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of ROY and JENNIFER RUBIN.	
ROY MOSHE RUBIN, Plaintiff and Appellant, v. JENNIFER RUBIN (FREELAND), Defendant and Respondent.	C077676 (Super. Ct. No. 12FL07023)
ROY RUBIN, Plaintiff and Appellant, v. JENNIFER FREELAND, Defendant and Respondent.	C079252 (Super. Ct. No. 12FL07023)

At issue in this marital dissolution action are the trial court's orders for child support, spousal support, and attorney's fees. In 2012, husband filed a petition for

separation from wife citing irreconcilable differences. Shortly thereafter, wife filed a request for dissolution of the marriage. The parties entered into a marital settlement agreement on a number of issues, leaving child support and spousal support for the trial court's determination.

The trial court conducted a protracted and contentious trial over a number of days between November 14, 2013, and April 10, 2014. Among wife's contentions at trial, she asserted that husband, an orthopedic surgeon and the owner of his own practice, had deliberately sabotaged the success of the practice to reduce his income, thereby greatly reducing the amount he would be required to pay to wife in support. The trial court issued a statement of decision on May 14, 2014, imputing annual income to the husband in the amount of $600,160, and basing its support orders on this amount.

One week after issuance of the statement of decision, and well before entry of judgment, husband filed a motion for a downward modification of his child and spousal support obligations based on changed circumstances. The trial court denied husband's motion without conducting an evidentiary hearing.

The trial court filed an amended statement of decision on June 10, 2014, and filed the judgment on April 1, 2015. Husband separately appeals from the order denying his first[1] motion for a downward modification of his support obligations (C077676) and from the judgment (C079252).

In his appeal from the denial of his first motion for a downward modification of his support obligations, husband asserts, among other things, that: (1) the trial court erred

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[1] Husband requested that we take judicial notice of the trial court's February 7, 2017, findings and order after hearing, granting husband's *second* motion to modify his support obligations. Finding it unnecessary to do so to resolve these appeals, we deny husband's request. Nevertheless, for purposes of accuracy, we occasionally refer to husband's motion to modify that is the subject of the appeal in C077676 as husband's *first* such motion.

in denying his motion without conducting an evidentiary hearing, and (2) contrary to the trial court's determination, he demonstrated a change in circumstances sufficient to warrant modification. On his appeal from the judgment, husband asserts that: (3) the trial court abused its discretion in imputing income to him in the amount that it did; (4) imputation was improper because it was not based on a reasonable work schedule and because there was an insufficient showing that the imputation ordered was in the best interest of the parties' children; (5) the trial court erred in admitting into evidence a "wish list" prepared by husband during marriage therapy and other evidence which was not relevant to any issue at trial; (6) the trial court erred in awarding attorney fees and costs in the amount awarded; (7) the trial court erred in awarding spousal support in the amount awarded; and (8) the trial court erred in refusing to reopen evidence. We ordered the appeals consolidated for purposes of argument and disposition.

We conclude that the trial court did indeed err in its imputation of income to husband, and that we must therefore reverse the support orders and remand for a new trial on the issues of child and spousal support, and the awards of attorney fees and costs. As for the wish list, we conclude that most of the entries were admissible under Family Code section 4320, subdivisions (i) and (n),[2] on the issue of spousal support in combination with wife's testimony regarding husband's emotionally abusive conduct. Our determination renders moot husband's remaining contentions on his appeal from the judgment and husband's contentions on the appeal from the denial of his first motion to modify his support obligations.

We reverse the support orders and attorney fees and costs awards and remand for a new trial on these matters, and we dismiss the appeal from the denial of husband's first motion to modify his support obligations.

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[2] Further undesignated statutory references are to the Family Code in effect at the time of the proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Family History and Pretrial Proceedings

In a petition filed on December 4, 2012, husband petitioned for legal separation from wife based on irreconcilable differences. The parties were married on February 23, 2003. The couple had three children, a daughter, born in 2003, a son, born in 2005, and another daughter, born in 2007. Husband sought joint legal and physical custody of the children, and to have the parties' property rights determined by the court.

Shortly thereafter, wife filed for dissolution of the marriage. She requested, among other things, joint legal and sole physical custody of the children, with visitation to be granted to husband.

Ultimately, the couple entered into a partial final marital settlement agreement. However, unable to reach agreement on a number of financial matters, including child support and spousal support, the parties reserved on those issues to be resolved by the trial court. Trial occurred over numerous dates between November 14, 2013, and April 10, 2014, before Judge Román.

As trial proceeded, the trial court directed the parties to brief the issue of whether the husband's orthopedic practice, Rubin Orthopedics, should be sold for purposes of asset distribution. Both parties opposed the sale of the practice. In a brief addressing the issue, wife requested that, instead of ordering the sale of the practice, the trial court impute income to husband "so that he would be forced to work at his capacity as a surgeon and support his family." In his brief, husband asserted that the sale of the practice would not be in the parties' best interests. He asserted that he had a plan for the ongoing viability of the practice, and represented that he had significantly increased the number of surgeries he was performing in order to increase his income. Ultimately, the trial court "acceded" to the parties' opposition to the sale of the practice.

The Trial Evidence

Husband's Case-in-chief[3]

Husband, a certified orthopedic surgeon, testified that he met wife during his residency on the East Coast. The couple moved to Sacramento where husband completed additional training. Wife gave birth to children in 2003, 2005, and 2007.

Husband opened his practice in 2004. Husband was the sole shareholder of Rubin Orthopedics, and he had no partners and no board of directors. He was the sole decision maker as to how to run every aspect of the practice. According to the parties' tax returns and other sources, husband's annual income derived from his practice was $93,491 in 2005; $157,279 in 2006; $713,243 in 2007; $919,245 in 2008; $925,971 in 2009; $396,568 in 2010; $346,003 in 2011; and $225,587 in 2012. Husband's earnings during some of this time included compensation he earned as director of pediatrics at Sutter Hospital. Wife did not recall when husband lost that position. Asked on redirect examination about the compensation for that position, wife testified that $100,000 "[s]ounds about right."[4]

Husband testified that, between 2007 and 2009, he worked 100 hours per week or more. In late 2009, husband and wife together decided that husband would spend more time with the family. Husband testified that at that time, he was 50 pounds overweight,

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[3] Due to, among other things, the order in which witnesses testified and which party called the witnesses, there is some confusion in the record as to whether witnesses were part of husband's case or wife's case, and whether those witnesses were testifying on direct examination or cross-examination. This confusion has no effect on any issue presented on these appeals.

[4] In his opening brief on the appeal from the judgment, husband refers to the trial court's acknowledgement of, among other things, "the termination of [husband]'s $100,000 per year directorship."

he had high blood pressure, one of his daughters "didn't like [him] very much," and he was "a mess."

According to husband, by the time of trial, he was "fighting to keep the practice alive." He testified: "Even though I'm not sure surgery is really my calling in life, I just -- I don't want the practice to die. And we're not able to pay our bills right now." Husband estimated that, in 2013, he would make $120,000, and he did not know what he would make in 2014. He testified that he never intentionally attempted to decrease his income. Husband testified that his pay from the practice consisted of whatever remained after everyone else was paid.

On cross-examination, husband testified that, in 2009, he performed approximately 350 surgeries; in 2010 he performed approximately 150 surgeries; in 2011 he performed approximately 50 to 100 surgeries; in 2012, he performed approximately 40 surgeries; and in 2013, he performed approximately 100 surgeries. He further testified that he saw approximately five times more patients in 2013 than in 2012. Husband acknowledged that, in his deposition testimony, he stated that he did not have any physical condition that limited his ability to work on a full-time basis. He testified that he also did not have any mental health condition.

Husband testified that, at some point, he was under investigation for the quality of care at his practice. Additionally, his practice had a contract with Sutter Health (Sutter), and Sutter stopped paying husband's practice. When Sutter did eventually pay the claims, they were "down-code[d]," which would result in payments of approximately $40 for a visit rather than the $150 billed. He testified that he and wife agreed that he would stop seeing Sutter patients as a result. Husband's practice lost many HMO and PPO patients, resulting in a shift in the practice's patients to MediCal and managed MediCal patients. Those plans paid one-third to one-half of what HMO and PPO plans paid. This resulted in a decrease in payments for office visits of more than 50 percent. Also, a

change in how providers were paid when they performed two related procedures simultaneously resulted in additional decreased revenue.

Husband testified that at some point he was not sure "whether surgery is the right thing for" him. Preparing for and performing surgery placed him under "tremendous stress." As a result, husband tried to make his practice work by hiring additional surgeons and physician assistants. Husband testified that he was interested in business, and that his ideal balance included performing approximately 50 surgeries per year so as to maintain his credibility and proficiency in running his surgical practice while adequately managing his stress. He hoped to continue in this manner and to recapture a greater portion of the PPO market. On cross-examination, husband testified that, at the time of trial, he was spending approximately 80 percent of his work time on surgeries and patient care, and 20 percent on his duties as medical director. Husband testified that running his practice was his passion.

On cross-examination, husband testified that MediCal, MediCaid, and MediCare patients constituted 90 percent of his patients. Husband testified that, at his practice, they "take care of poor people, but I enjoy it."

Husband testified that there was nothing he could do to make more money than what he was doing at the time of trial. He had applied for a job at Kaiser, "but that's not what [he] want[ed] to do." On cross-examination, he acknowledged that he had not applied for a specific or advertised position; he had simply submitted his resume. His resume was rejected due to inadequate recent surgical experience.

On redirect, husband testified: "I have no—no money. I have no assets. I have—I have no income. I have no money." He testified, on February 3, 2014, that he had not received a paycheck from the practice since November or December 2013.

Husband testified that his father was paying for his trial attorney. Husband had signed a promissory note in favor of his father for an amount between $230,000 and $250,000. According to husband, his father made support payments to wife, paid the

court-ordered attorney fees to wife's attorney, paid for husband's living expenses, and paid for husband's attorney fees. Husband's father also paid the mortgage on the marital home, which wife had moved out of in January 2013.[5] Husband also employed a live-in nanny, paying her $400-$600 per week plus housing.

Husband denied abusing wife in any way. He further testified that wife never accused him of abuse during the marriage.

David Black testified as an expert in business evaluation and "income available for support calculations." Black had performed an analysis of Rubin Orthopedics as of December 31, 2012. Black explained that he had been retained to value the practice "as to the date closest to the date of separation." To perform his valuation, Black reviewed financial documentation including accounts payable and receivable, toured the facility, interviewed husband, and worked with the practice's office manager, Aaron Cask, to obtain financial information. Black concluded that the practice was worth $127,000. However, Black further testified that he did not "stand by that value today." On cross-examination, Black opined that, since he performed his valuation, the value of the practice had likely increased. Asked whether husband's practice had substantially diminished compared to prior years, Black responded, "He's still performing surgeries, but not the same level he was." According to Black, husband performed 39 surgeries in 2012, 59 in 2011, 191 in 2010, 389 in 2009, 324 in 2008, and 309 in 2007. In 2009, when he performed 389 surgeries, husband's personal income was almost $926,000. Black acknowledged that husband had reduced his surgical output by 90 percent between 2009 and 2012. Black testified that, at the time of trial, husband was primarily the office manager and medical director at the practice and that there were other income-producing

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[5] Ultimately the trial court ordered the marital home sold at a listing price of $1.1 million. Husband's father purchased the house for $1.151 million. The trial court noted in the amended statement of decision that husband continued to reside in the home.

providers at the practice. Black also testified that, from 2011 to 2012, the number of surgeries performed by all providers at the practice increased.

Black acknowledged that Darren Silva, wife's expert, also prepared a valuation of the practice, and that Silva valued the practice at $225,000. Asked to explain the difference between the two valuations, Black testified that, although he "considered" goodwill in performing his valuation, he found no goodwill attendant to the practice, and, while Silva may not have calculated goodwill as such, he did assign a "going concern" value of $25,000. Black did not assign goodwill or a going concern value because he did not believe that the practice was marketable. Black testified that he did not "see it as a high performing practice, something that would necessarily be marketable to another individual or practice." Black also testified that he and Silva treated "the tax affecting of accounts receivable differently."

Black also prepared a report addressing husband's income available for the calculation of support. Black concluded that husband had an income available at the time of approximately $12,000 per month.

Aaron Cask was the office manager at Rubin Orthopedics. In 2013, Cask saw husband at the practice on average 30 to 40 hours per week. Cask was also aware that husband performed work outside of the office. Cask testified that, as of the time of trial, the practice had 25 employees.

Cask testified, relevant to reducing expenses, that the practice had eliminated its marketing department in October 2011, which had consisted of three or four people. The practice also eliminated the billing manager position. The practice changed telephone carriers and did not renew the lease on an upstairs suite. Additionally, the practice changed malpractice carriers for a "much better deal." Also, the practice converted to electronic documentation rather than being a paper-based practice. Everyone's pay at the practice was cut by ten percent.

Regarding billing, Cask testified that, when he first began working in the practice as a medical biller, all office visits and patient consults were coded at the highest possible level of five on a billing scale of one to five. As of the time of trial, Cask testified that 70 to 80 percent of office visits were coded at level three. According to Cask, the average amount billed for an office visit billed to a PPO as a level five would be approximately $170 or $175. An office visit coded as a level three billed to a PPO would bill between $45 and $55. A new patient office visit coded as a level five would be billed between $190 and $230, whereas a new patient office visit billed as a level three would bill at approximately $150. Additionally, some insurance carriers had disallowed coding for new patient consults and only allowed coding for new patient office visits, which bill at 10 percent less.

Cask also testified that, from the period between 2007 and 2009, and the period between 2012 and 2013, there had been a change in the types of insurance predominately billed at the practice. Whereas in the period between 2007 and 2009, the typical patient would be insured through an HMO or PPO insurance plan, as of 2012 and 2013, the practice's typical patient would be insured through MediCal or a MediCal-based managed care plan. According to Cask, typically the practice in 2007 through 2009 was billing patients insured under PPO plans at level five, thus billing at approximately $150. A level three visit for a MediCal patient would reimburse at $25. Cask testified that the risk of resuming the practice of billing consistently at level five, as the practice had done in the past, was that the practice could be audited.

Cask further testified that five to ten percent of the practice's patients were straight MediCal patients, but "MediCal managed" patients constituted a "huge portion" of the practice's patients. A MediCal managed patient is one who qualifies for MediCal, but whose care is managed by a third party. MediCal managed reimbursed at a higher rate than straight MediCal. Cask estimated that 60 to 70 percent of the practice's patients were MediCal managed patients. Cask testified that the practice treated approximately

twice as many MediCal patients at the time of trial as it did between 2007 and 2010. According to Cask, the practice would lose money on every MediCal patient. Cask also testified that the practice never declined to treat a patient based on inability to pay.

According to Cask, the check he issued for the December 2013 rent for the practice bounced. Additionally, the practice did not have sufficient funds to pay husband a salary for at least two recent pay periods. Cask testified that, as of December 18, 2013, husband's year-to-date earnings had been $110,000.

Cask testified that husband performed approximately 40 surgeries per month in 2007; approximately the same number in 2008; "a little less," perhaps 30 per month, in 2009; approximately 20 per month in 2010; and, by 2012, he performed only about 25 surgeries all year. Cask testified that "[i]t would appear" that there came a time when husband decided to reduce his work hours considerably. However, on redirect, Cask testified that the practice was performing slightly more surgeries in 2013 than it did in 2009. Cask testified that husband was available any day of the week to perform surgeries so as to maximize the number of surgeries performed.

Cask testified that, at the time of trial, husband was devoting approximately 65 to 70 percent of his work hours to clinical and surgical work and 30 to 35 percent to administration; however, prior to the summer of 2013, husband devoted more time to administration. During the first three quarters of 2013, husband spent approximately 60 percent of his time on administration. Cask testified that since then some of the administrative work husband had been performing was no longer necessary, and some had been reassigned to Cask.

Michael Cerruti was an orthopedic surgeon who had been employed at Rubin Orthopedics since October 2009. He performed surgery two days a month, and he saw patients at the practice on six other days throughout the month. When husband hired Cerruti, the two of them were the only surgeons working at the practice.

Cerruti believed that the practice's revenue had decreased by approximately one-third between 2012 and the time of trial. One reason was coding and the other reason was the change in "insurance mix." Cerruti saw an increase in the patients with MediCal insurance over the three years preceding his testimony, and in particular in the prior year. The change in the referral base led to a decrease in revenue at the practice.

Cerruti testified that, at some point in 2010, Rubin Orthopedics stopped receiving referrals from Sutter. This was because of husband being in competition with a Sutter surgeon, both of whom were performing scoliosis surgeries, and because Sutter was not paying the bills the practice submitted.

Cerruti testified that, when he started working at Rubin Orthopedics, husband seemed to be very busy both with surgeries and with work in the practice. By spring of 2011, Cerruti noticed that husband was not on the surgery schedule as much, and he also did not see him in the office as much. Husband told Cerruti that he was "slowing down so he could spend more time with his family."

Cerruti testified that he had not perceived a change in the scope of husband's duties at the practice since he had been working there. He testified that he believed husband would like to assume more of an administrative role while still performing a number of surgeries to keep up his credentials and his training.

Cerruti testified that husband was trying to increase revenue by hiring other physicians to do the orthopedic work. Cerruti never got the sense that husband was not seeking to maximize the profitability of the practice. Asked about this on recross-examination, Cerruti testified that his opinion was based on the fact that husband "was very active in trying to recruit physicians into the practice" on the theory that if the practice saw more patients, it would make more money.

Cerruti had also experienced a delay in being paid by the practice which he believed to be because the practice was not earning as much as it had previously and it could not afford to pay everyone on staff.

Cerruti testified that he worked approximately 47 weeks and earned $2,127 per week in 2010 and 2011; he worked approximately 44 weeks and earned $1,772 per week in 2012; and he worked 49 weeks and earned $1,490 per week in 2013. Asked if he could explain why he was paid less despite working more in 2013, Cerruti testified that he believed the practice was "taking in less per patient."

Naomi Kinert, a vocational evaluator, testified concerning her preparation of a vocational evaluation for wife, a matter ultimately not at issue on these appeals. Husband's attorney began to inquire of Kinert whether, at husband's request, Kinert researched salary information for medical directors and surgeons. Wife's attorney successfully objected on the grounds that Kinert was testifying as an expert relative to her evaluation of wife, not husband, she had no expertise concerning husband's personal career, and the information sought to be elicited was outside the scope of what Kinert was hired to do. Thus, Kinert offered no testimony concerning husband's employment, employability, or prospects.

Husband's attorney called wife to testify. Wife testified that the parties had separated on December 4, 2012. She testified that husband told her that he wanted to divorce her before their marriage reached the 10-year mark "because he did not want to pay for me or my living expenses for the rest of my life."

Wife denied that, after 2009, the parties jointly agreed that husband should work less and spend more time with the family. She also denied husband's representation that the couple decided jointly that he would focus on administration rather than surgery. She testified that husband dropped his contract with Sutter which led to the end of Sutter patient referrals, rather than Sutter stopping its relationship with husband. She did not agree with husband's decision to terminate the Sutter contract.

Wife estimated that, at his busiest, husband worked approximately 68 hours per week. When he reduced his working hours, he did not increase the time he spent with the

children. Wife denied husband's representation that she was strongly opposed to him being on call.

On cross-examination, wife testified that, in 2009, she became pregnant. She decided to terminate the pregnancy. Husband was, at times, understanding, and, at other times, insistent that wife not terminate the pregnancy. Husband drove wife to the surgery center for the abortion and was supportive. However, by the time the couple was driving home, husband's attitude had "flipped" and he was making remarks including accusing wife of killing his child. According to wife, following the abortion, husband was verbally and sexually abusive. Wife testified that in addition to yelling at her, accusing her of killing his child, and calling her a bitch, husband was sexually abusive, by which she meant that he was sexually demanding, regardless of whether she was comfortable or if she did not feel like the relationship was "in a good place." According to wife, the fact that she had the abortion and the fact that husband did not get what he wanted—to have another child, preferably a boy—seemed to make husband feel that he had the right to do certain things so that he could "recover from this," including demanding sex whenever he wanted it, seizing complete control of all of the couple's money,[6] yelling at wife, and waking her up in the middle of the night to "harass [her] about things." Wife testified that she did not feel that she had a voice in the marriage, and she did not feel as though she was an equal partner in the marriage.

Wife believed that, in 2009 or 2010, husband implemented a plan to deliberately reduce his income, and testified that he had said, "I will not work to pay you. I will do everything within my power—spend all of my dad's money, spend all of my time and my money—because I am not working to pay you. I'm just not doing it." According to wife,

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[6] Wife testified that prior to the abortion, she controlled the finances and paid the bills. At some point, husband cut off wife's access to the bank accounts, saying that he was not going to earn money for her to spend.

husband said this many times, beginning after he discovered that wife had paid a divorce attorney a $20,000 deposit.

After husband learned that wife had hired a divorce attorney, he convinced her to go with him to marriage counseling. During the time they were attending therapy, at the request of their therapist, husband created a wish list of things he wanted from wife. Among the items on the wish list was that wife would recover the $20,000 she had given to the divorce attorney. The trial court admitted this wish list into evidence, over husband's relevance objection. The wish list is discussed in greater detail in part III. of the Discussion, *post*.

During the marriage, perhaps in 2010, husband, a nationally ranked squash player, had a squash court built at the house. Wife believed that it cost $180,000 to $250,000. Husband also had a lap pool installed at the house for approximately $150,000.

Wife testified that, when she sought to have income imputed to husband in the amount of $847,000, she arrived at this figure by "looking at the three years when he was working as a full-time surgeon: 2007, 2008, and 2009." She testified that this figure represented an average of those three years.

As of March 14, 2014, wife had paid $678,000 to her prior and current attorneys.

Wife's Case

Darren Silva testified as wife's expert concerning the valuation of Rubin Orthopedics, the income available for support, and the marital standard of living. Silva reviewed corporate tax returns for the practice, personal tax returns for the parties, and additional financial information pertaining to the practice.

With regard to the income available for support, Silva testified that husband's average gross monthly income was almost $60,000 in 2007, was more than $76,000 in 2008, and was just over $77,000 in 2009. According to Silva, from 2009 to 2012, husband's average gross monthly income dropped by $58,365, or approximately 76 percent. Based on documentation from Black's valuation, Silva opined that fair

compensation for someone working as a medical director of a practice and additionally performing 36 surgeries annually would be $22,000 per month. On cross-examination, Silva testified with regard to income available for support that, based on 2012 figures, that amount should be approximately $226,000 annually or $18,819 monthly.

As for his valuation of the practice, Silva testified that, in his opinion, the practice was worth $208,700 as of the date of his valuation. Silva considered tax returns, business financial statements, and the fact that he was valuing "a business that has declining revenue." Silva determined that adjusted book value was likely the best indicator of value at the time. Unlike Black's valuation, Silva included value for a business that was "up and running" with a workforce in place, an established office, and existing clientele, which he referred to as "turnkey value." Silva added $25,000 to his valuation of the practice as a result, although he thought that amount was probably on the low side. Silva noted that the two biggest differences between his valuation and Black's was the turnkey value and the taxes on accounts receivable, which Silva calculated in a different manner than Black.

With regard to the marital standard of living, Silva considered the years from 2008 through 2012. Silva performed a "high-level analysis," meaning he made his calculations based on the couple's tax returns only, and did not delve into a more detailed analysis based on all individual income and expense transactions. Silva testified that, in 2009, each party would need $35,600 pretax gross per month to replicate the marital lifestyle living separately. In 2008, wife would need $38,600 monthly to replicate the marital standard of living. In 2010, wife would need $18,700 per month to achieve the marital standard of living. In 2011, she would need $18,000 per month.

Silva testified on cross-examination that he did not receive sufficient information to determine husband's fair compensation. He testified that, "for doctors when we determine compensation and whether there's excess earnings and goodwill, we look at production. That's the information we were never provided was the total production for

the practice and [husband]'s specifically. That's the information we were never provided." Silva testified that he did not perform a "true fair comp analysis because [he] didn't have the information to do that. [Silva] relied on what Mr. Black estimated as [husband]'s fair comp, but that was—Mr. Black only did it based on what [husband] is current—or was currently doing. Meaning, as a practice administrator plus . . . it's approximately 36 surgeries for the -- for a year. That's the fair-comp analysis that Mr. Black did." Silva testified that, by "fair-compensation analysis," he meant what a similarly situated person with similar expertise, background, history, and production should be earning performing the same job. Silva testified again that he did not have the data to perform such an analysis of husband. By the time of his testimony on February 4, 2014, Silva had billed wife approximately $49,600.

Marsha Summers operated a consulting company and performed work for physicians and hospitals, including consulting and overseeing medical billing. Wife retained Summers to evaluate Rubin Orthopedics to offer her opinion on the health of the practice and the state of its reimbursements. Wife also had Summers develop an opinion as to what would be reasonable compensation for husband as an orthopedist in Sacramento. In performing this task, Summers relied on a report from the Medical Group Management Association which provided data for earning capacities for orthopedic surgeons in the western United States, data concerning what other orthopedic surgeons in California were earning, conversations with practice managers at various practices, positions available in the area for orthopedic surgeons, and husband's "previous performance." However, when asked about her opinion regarding reasonable compensation for husband, husband's attorney objected, asserting that Summers was not disclosed as an expert who would opine on reasonable compensation for husband. Wife's attorney ultimately withdrew her question which addressed compensation. The court stated that it would allow the questioning "as to opportunity only," but that "[i]n terms of me making a finding as to income, I cannot."

Summers testified that, when she researched employment opportunities for orthopedists in Sacramento, she discovered very few of them. Kaiser was hiring for a position in Roseville, and the Veterans Administration hospital was hiring. The position at Kaiser paid $400,000. Summers did not know how much the Veterans Administration hospital position paid.

Summers testified that, over the prior five years, reimbursements for orthopedic practices had declined by 10 to 15 percent. However, Summers also testified that this trend would not explain the large variances in husband's income between 2008 and 2013, specifically a reduction of 57 percent from 2009 to 2010, 14 to 15 percent from 2010 to 2011, 35 percent from 2012 to 2013, and, overall, a reduction of approximately 88 percent between 2009 and 2013. Summers testified on redirect that, in addition to a reduction in reimbursements, if husband spent 80 percent of his time on administration, leaving no more than 20 percent for surgeries and patient care, that would have an enormous impact on his income. She testified on recross-examination that she had never encountered the situation where a physician performed administrative tasks such as pricing medical supplies, negotiating with insurance companies, and dealing with billing.

On redirect, Summers testified that, if husband were the only surgeon at the practice, his decision to work less would result in lower revenue. However, if he had added surgeons, diminishment in income attributable to his reduction in hours should be offset by the income produced by the additional surgeons, provided the practice is run efficiently.

On cross-examination, Summers testified that MediCal pays approximately seven cents on the dollar.

Husband's Rebuttal Case

Katie Conrad worked at Rubin Orthopedics from approximately 2006 to 2011, first as a medical assistant, then as the surgery scheduler, and finally, from 2008 through 2011, as the practice administrator. As practice administrator, Conrad was in charge of

"finances, the front medical staff, the back office, our marketing department, recruiting physicians, and any other items that came up." In her capacity overseeing finances, she supervised the billing department, paid bills, and was on the practice's bank accounts. Conrad testified that, between 2008 and 2011, many of the practice's existing patients lost their insurance and "went from being . . . PPO patient[s] to . . . MediCal or a form of MediCal." This resulted in a reduction in payments to the practice for the services performed. Conrad testified that husband was always happy to have PPO and HMO patients because their insurance paid more.

Conrad testified that part of her job as practice administrator was to seek ways to maximize profits. Conrad never got the sense that husband did not want her to maximize profits at the practice. She never saw anything during her time as practice administrator that led her to believe that husband was not seeking to maximize profits.

During the time that Conrad was practice administrator, the practice's income decreased. Conrad explained that factors causing this decrease included the transition of patients' insurance from PPO and HMO plans to MediCal plans, cancellation of the Sutter contract, loss of a Blue Cross MediCal contract, and fewer surgeries being performed overall. With regard to the Sutter contract, Conrad testified that Sutter had been automatically down-coding patient visits. For instance, if the practice billed a level five visit, Sutter would automatically down-code it to level two or level three.

During Conrad's time as practice administrator, the way the practice billed changed. The practice went from billing almost exclusively at level five to billing at levels three and four. Husband told Conrad that the change arose beginning with the Sutter investigation of Rubin Orthopedics' coding practices, and, shortly thereafter, almost every other insurance company "did the same thing." Blue Shield also performed an audit of approximately 15 office visits and sought patient records to verify appropriate coding. At that point, which was shortly after the Sutter contract was cancelled, the practice "modified the way we billed to more appropriate levels." The Sutter

investigation coupled with the Blue Shield audit "kind of woke [husband] up that you can't be billing five level visits for every single visit any longer." Husband was unhappy with the change because it meant reduced income, but, at the same time, he did not want to be audited for his billing practices. Conrad also noticed a reduction in the number of referrals, at least in part due to the cancellation of the Sutter contract.

According to Conrad, in August 2010, all employees at Rubin Orthopedics took a 10 percent pay cut.

Conrad acknowledged that, when she left the practice, husband was performing fewer surgeries than when she became practice administrator. When she began as practice administrator, he was performing hundreds of surgeries per year, and, by the time she left, he was performing only a handful of surgeries. Conrad testified that the reduction in the practice's income correlated with the reduction in the number of surgeries performed by husband. Husband was also working less and spending fewer hours at the practice.

In his rebuttal testimony, husband testified that he never tried to decrease his income.

Tentative Decision

On April 30, 2014, the trial court issued a tentative decision. The court summarized that husband's annual income was $93,491 in 2005; $157,279 in 2006; $713,243 in 2007; $919,245 in 2008; $925,971 in 2009; $396,568 in 2010; $346,003 in 2011; $225,587 in 2012; $120,363 in 2013; and $100,716 in 2014. The court further noted that, as of March 2014, husband claimed a monthly income of $0, although the trial court also made a point of observing that husband "resid[ed] in a million dollar home with a compensated nanny for his children."

The trial court calculated the percentage of the practice's gross receipts that accounted for husband's annual income. This percentage, as a general matter, ranged from a peak of 38.8 percent in 2008, when husband earned $919,245, to a low of 6.1

percent in 2013, when husband's income dipped to $120,362,[7] and the practice's gross annual receipts had declined to less than $2 million. However, in something of an outlier year, 2005, husband's income of $93,491 amounted to 90.3 percent of the practice's gross receipts.

The trial court concluded that husband's earning capacity was higher than he represented. (1 AA 158) Among the factors the trial court deemed subject to particular scrutiny was the timing of husband's "claimed decision to undertake a life change and reportedly concentrate less on surgeries and more on medical administration." The trial court stated that husband failed to appreciate the fact that the more surgeries he performed, rather than focusing on administration, the greater the practice's gross receipts. The court noted that husband's reduction in the number of surgeries he was performing resulted in a loss of income to the practice, while husband instead focused on non-income-producing medical administration, which need not be performed by a physician.

The court expressly stated that, despite the fact that husband was most recently claiming an annual income in the range of $100,000 (although as of Mar. 2014, he claimed an income of $0), husband's earning capacity was "clearly significantly higher." The court stated: "[Husband] can clearly earn more than the $120,000 earned in 2013 or $100,000 arithmetically extrapolated for 2014. [Husband] simply chooses not to earn more. That choice, however, finds self-serving ostensible support in such factors as a disinterest in surgeries and interest in medical administration, the demands of medical administration versus the time for surgeries, and a litany of other reasons. And, admittedly, with fiscal assistance from his father, [husband] personally need not earn

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[7] We note the $1 discrepancy in the court's recitation of husband's income in 2013 from its previous statement, but disregard this discrepancy as inconsequential for present purposes.

more. 'Loans' from his father provide an ability to meet his personal obligations to the children's nanny and other living expenses. And reflecting his characteristic propensity for shifting responsibility, he invites this court's intercession to confirm an income of approximately $100,000 as consistent with an earning capacity upon which his support obligations to his children and spouse should be based. That invitation is declined." The trial court concluded that, "[d]espite his arguments, self-serving protestations and portended altruism, the evidence established that [husband] is singularly intent on avoiding any fiscal obligation to [wife]." The court later concluded that husband, "by his own design, . . . has deliberately, designedly, and . . . maliciously reduced his income potential to th[e] bottom tier of orthopedic surgical compensation."

The trial court observed that, generally, a supporting spouse's earning capacity consists of " 'the income the spouse is reasonably capable of earning based upon the spouse's age, health, education, marketable skills, employment history, and the availability of employment opportunities.' " The trial court noted that courts must be mindful that imputation of earning capacity requires proof of both the spouse's ability and opportunity to earn the income imputed. The court concluded that wife satisfied her burden of proving both husband's ability and opportunity to earn, as well as husband's "expressed motive and intent in depressing his earned income."

In evaluating husband's earning capacity, the trial court recited that it considered, among other things, husband's occupation and a reasonable work regimen for an orthopedic surgeon with his particular talent, education, skill, knowledge, experience, and training. To determine husband's earning capacity, the trial court turned to husband's earning history at Rubin Orthopedics. The court narrowed its focus to the practice's preceding five years of gross receipts and concluded that husband's earning capacity was between $400,000 and $900,000 annually or more. The court further stated that, during the relevant period, the practice's gross annual receipts averaged $2,105,826. Mindful of, among other things, what it deemed to be husband's election to concentrate on

administration rather than performing income-producing surgery, the trial court concluded that husband's income amounted to between 22.05 and 28.25 percent of the practice's gross receipts, and the court selected 28.25 percent as the operative figure for determining husband's earning capacity. The court concluded that husband's annual earning capacity was $600,160.[8]

Based on, among other things, this imputation of income to husband, the trial court ordered husband to pay $8,637 per month in spousal support. The court further ordered husband to pay child support in the amount of $3,894 per month between September 1, 2013, and March 31, 2014, and thereafter $3,997 monthly.

Statement of Decision

Husband requested a statement of decision. The trial court issued a statement of decision filed on May 14, 2014. The statement of decision reflected the substance of the trial court's tentative decision, with modifications.

Husband's First Motion to Modify Child and Spousal Support

By motion filed May 21, 2014, one week after the court issued its statement of decision, husband moved to modify his child and spousal support obligations. In a declaration in support of the motion, husband asserted that, in the first months of 2014, he had earned nothing because his practice was failing. Husband asserted that he could not comply with the existing support order. Husband stated that since 2009, he had not earned close to the $600,000 annual income imputed to him. Husband repeatedly asserted that he was not able to earn the level of income imputed to him by the trial court.

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[8] We note that $600,160 is not 28.25 percent of $2,105,826; $594,896 is 28.25 percent of $2,105,826. It appears, as asserted by husband in his reply brief on the appeal from the judgment, that the trial court, after stating that it would employ the 28.25 percent figure, actually multiplied $2,105,826 by 28.50 percent instead.

Husband asserted that his reduction in income was attributable to his choice to focus on administration rather than performing surgeries, which he delegated to other surgeons in the practice. He also attributed the reduction in his income to a number of other factors, including a shift in the practice's patient base from affluent patients to indigent patients; a change, following an audit, in coding practices; global recession; the loss of a contract with Sutter and all referrals from Sutter; and a trend of patients seeing physicians in larger hospitals rather than at smaller practices. Husband also asserted that he had dramatically increased the number of surgeries he was performing, although he asserted that evidence of this had been excluded at trial.

Husband asserted that, by the time of his modification motion, the practice was in far worse condition than it had been at the time of trial. According to husband, since trial, he had been unable to pay the rent, and the practice had been forced to vacate a portion of the rented premises. A notice of eviction had been posted on the other portion of the rented premises.

Husband stated that he had been conferring with recruiters and otherwise looking for work as an orthopedic surgeon outside of the practice, given his concerns about the practice's viability. He had not limited these efforts to opportunities in Sacramento, but had been looking in other areas, including the Bay Area. One recruiter told him that he or she was not aware of any openings for a pediatric orthopedic surgeon in the greater Sacramento area. When he asked a recruiter at the same agency about possibilities in the San Francisco area, she responded, "not much out there." He had applied for one position at Kaiser and had been rejected. Husband stated that he had been looking for jobs on various websites, to no avail.

With his motion, husband submitted a declaration from Steven Polansky, M.D., one of two managers at the Greater Sacramento Surgery Center, a facility where husband performed surgeries for his practice. Polansky stated that he had never seen a surgeon at that location work the number of hours husband worked in 2008 and 2009. At that time,

husband was performing an "enormous number of surgeries . . . ," often beginning at 7:00 a.m., and not finishing until 10:00 p.m. In fact, Polansky spoke to husband, cautioning him about the risk of "burn[ing] out" and advising him that the workload he was carrying at that time was unsustainable.

In an income and expense declaration filed with his modification motion, husband claimed that he earned $0, while working 70 hours per week.

In his memorandum of points and authorities submitted in support of his motion, husband asserted that he had experienced a significant change in circumstances which would warrant a modification in his support obligations. Before addressing these changed circumstances, husband advanced a number of arguments as to why the trial court's determination to impute income to him in the approximate amount of $600,000 annually was erroneous in the first place.

Turning to the alleged changed circumstances, husband stated first that he had substantially increased his surgical output. He had been working 60 to 70 hours per week, and spent approximately 80 percent of that time on surgeries and patient care. Husband stated that the expectation that he would earn more money if he focused his efforts on surgery and patient care rather than administration had "not been realized."

Husband discussed the deterioration of his practice. At the time of trial, which concluded 41 days before the husband filed his motion, five physicians worked at the practice. However, husband was unable to pay them. He had canceled the contracts of three of the physicians. He offered three of the physicians partnerships, so that they would share expenses and responsibility for the practice. However, they indicated that it was likely that they would decline, and one of them had tendered his resignation. Other employees had resigned from the practice as well. Husband anticipated that referrals would decline in the absence of a podiatrist, a total joint replacement surgeon, and a spine surgeon.

Husband cited as another change in circumstances his inability to continue to work 60 to 70 hours per week. He emphasized that he had 50 percent custody of the children and he no longer had a live-in nanny, and that he could not work so many hours while being a father to his children.

As another change in circumstances, husband stated that he was increasingly finding that he no longer enjoyed orthopedic surgery. He emphasized that it was not fair to patients to require him to perform surgeries which he lacked the desire and motivation to perform. He asserted that it amounted to poor patient care for him to be required to perform as many surgeries as possible to maximize his income under threat of court sanction for failing to meet his support obligations. Husband also asserted that he lacked the focus and concentration necessary to perform the number of surgeries he was performing, citing the toll this dissolution proceeding had taken on him.

Husband asserted that, despite diligent efforts, he had been unable to find employment at another hospital or clinic as an alternative to working at his practice. He set forth the efforts he had made to find employment, duplicating those representations from his declaration.

Husband further asserted that, even if the court determined that there were not sufficient changed circumstances to warrant a modification of his support obligations, the court should modify the support order based upon equitable principles and the interests of justice. He asserted that it was not in the children's best interests for him to be working as hard as he was while remaining unable to satisfy his support obligations.

Wife opposed husband's motion, arguing that it essentially constituted a "poorly disguised" motion for reconsideration, but with the benefits to him that it would not be heard by the same judge who issued the original orders and he would not be required to furnish new facts or new law in support of his position, which he would not be able to do a mere week from the issuance of the statement of decision. Wife further asserted that the evidence at trial was sufficient to support the trial court's determinations.

On the merits, wife asserted that husband was simply claiming he was unable to pay support based on the amount imputed to him by the trial court following a lengthy and thorough trial. With regard to husband's evidence that was excluded at trial (which he claimed would demonstrate that, between 2012 and 2014, he had increased his surgical output but had not realized a corresponding increase in income), wife stated that the trial court properly made its determination to exclude such evidence, and that it did so, at least in part, due to husband's failure to furnish the evidence to wife in discovery.[9] As for the failing of husband's practice, wife asserted that the trial court judge either anticipated these matters during trial or could have foreseen them. According to wife, the trial court judge "was well aware that [husband] had spent the past four years squandering his skills, professional network, and other revenue-generating assets. The loss of staff and contractors, and the short-term difficulty covering his overhead, are not an unforeseen results of his egregious conduct." Thus, wife asserted that husband's motion papers "do not give us any new information, in that the rapid downward spiral of Rubin Orthopedics was known throughout trial. We also knew that [husband] had been the sole driver of its demise." Wife emphasized that the trial court did not conclude that husband earned approximately $600,000 annually; rather, the trial court found that husband had the *capacity* to earn that sum. Wife also asserted that the departure of the live-in nanny employed by husband was a matter disclosed at trial, and thus not a change in circumstances. According to wife, husband had since hired a new nanny.

In reply, husband asserted that since he filed his modification motion, matters had continued to deteriorate for him and his practice, resulting in additional changed circumstances. He stated that the practice's landlord had filed a lawsuit for more than $50,000 in back rent. The landlord was going forward with eviction proceedings.

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[9] Husband does not challenge the discovery ruling on these appeals.

According to husband, his practice would be evicted by the end of July 2014, at which time he would have no office in which to see patients. Husband also stated that he had received a demand letter on behalf of one of the practice's vendors, seeking more than $18,000 for medical supplies. All of the practice's employees had left. Husband was in the process of closing and winding up the business. Husband stated that he was in the process of filing for bankruptcy. He asserted that, if he had always intended to close his business as wife contended, he would have consented to its sale.

Husband maintained that the demise of his practice was a changed circumstance warranting a modification of his support obligation. Husband argued it was clear that the support order presumed the continued operation and viability of the practice inasmuch as the trial court imputed income to him based on a percentage of the gross receipts of the practice. Because the trial court imputed income to him as a percentage of the practice's gross receipts, 28.25 percent of the current gross receipts of $0 obviously amounted to $0. Husband insisted that the failure of his business occurred through no fault of his own.

Amended Statement of Decision

On May 28, 2014, one week after husband filed his motion to modify his support obligations, he filed various objections to the statement of decision.

On June 10, 2014, the trial court (Román, J.) filed an amended statement of decision. Much from the original statement of decision remained unchanged. However, the trial court adjusted its calculation of the practice's average annual gross earnings from $2,105,826 to $1,920,414. The trial court noted that, in the final days of trial in 2014, husband reported an earned income of $0. Nevertheless, the trial court arrived at the same figure for husband's annual earning capacity: $600,160.

The trial court reduced the monthly amount of child support husband was required to pay, directing husband to pay $3,557 for the period from September 1, 2013, through March 31, 2014, and $3,700 thereafter. The court did not modify spousal support, maintaining the monthly amount of $8,637 from the original statement of decision.

Motion for a New Trial

On June 10, 2014, husband moved for a new trial. Husband asserted that there was insufficient evidence presented at trial to impute income to him in the amount imputed by the trial court. Husband also asserted that documents demonstrating that he drastically increased his surgical output in late 2013 and early 2014 should have been admitted at trial. According to husband, this evidence was highly relevant, and its exclusion highly prejudicial, because this evidence would have shed light on whether, as the trial court believed, an increase in his surgical output would actually result in an increase in his income.

On July 22, 2014, the trial court (Román, J.) denied husband's motion.

Oral Argument on Husband's First Motion to Modify Support Order

On September 16, 2014, the trial court (McBrien, J.) heard argument on husband's first motion to modify his support obligations. Husband's attorney requested an evidentiary hearing on the matter, and further requested a temporary order, in effect, staying the support requirement pending such a hearing.

Wife's attorney responded that there was no need for an evidentiary hearing. According to wife's attorney, all of the information relied upon by husband was either known or reasonably foreseeable at trial.

The trial court stated that it was not inclined to hold an evidentiary hearing. Husband's attorney objected, stating that a number of relevant circumstances had changed since trial. According to husband's attorney, significant evidence was not considered at trial, including evidence concerning husband's income in 2014, and the court based its decision at trial on evidence that preceded the time of trial. In issuing the statement of decision, the trial court did not consider evidence from 2014 or late 2013. Husband's attorney emphasized that, when she attempted to enter additional evidence into the record, the judge who issued the statement of decision stated, "Listen, this trial outcome might be very different were I to try this case today, but I didn't. I tried it last

year based on the evidence from then." Husband's attorney asserted that this statement was revealing. She asserted that circumstances had changed dramatically since the evidence was admitted at trial. According to husband's attorney, the court imputed $600,000 as income to husband based on a percentage of gross receipts of his business, but that business no longer existed. Thus, the same percentage of husband's current income would be $0 in light of the dissolution of the practice. Husband's attorney asserted that there could be no more dramatic change in circumstances than the basis for the imputation of income ceasing to exist. Acknowledging that wife's attorney was arguing that husband deliberately undermined his practice to reduce his income for purposes of these proceedings, husband's attorney asserted that husband had not intentionally sabotaged his own business, and that factual dispute was a reason for holding an evidentiary hearing. Husband's attorney stated that, because there was a sufficient showing of changed circumstances, it would deprive husband of due process to deny his motion without a hearing.

Wife's attorney asserted that husband's arguments were for an appellate court or for a trial court on a motion for a new trial. Wife's attorney further asserted that all of husband's arguments to the effect that he was not allowed to present relevant evidence at trial and that the trial was unfair had been advanced previously and rejected by the trial court. Wife's attorney argued there had been no change in circumstances, and at some point, the matter had to achieve some finality.

Husband's attorney emphasized that the business had failed and had been evicted from its premises since trial and after the issuance of the amended statement of decision. In response, wife's attorney stated that there was testimony at trial concerning the likelihood of this eventuality.

The trial court (McBrien, J.), without holding an evidentiary hearing, denied husband's motion.

Judgment

The trial court (Román, J.) filed its judgment on April 1, 2015. Various matters, including property division and child custody and visitation, were addressed in attached orders and the final marital settlement agreement. Among other things, the child support information and order attachment indicated that annual income of $600,160 had been imputed to husband, and directed husband to pay $3,700 per month in child support. The spousal support order attachment directed husband to pay wife $8,637 per month.

In the attorney's fees and costs order attachment, the trial court directed husband to pay $488,000 in attorney fees and $37,500 in costs. Additionally, the attorney's fees and costs order attachment directed: "[Husband] shall pay [wife] attorney fees pursuant to . . . Section 271 in the sum of $75,000.00; and [wife] shall pay [husband] attorney fees pursuant to . . . Section 271 in the sum of $5,000.00; however, the two amounts shall be offset resulting in a singular . . . Section 271 award to [wife] in the sum of $70,000.00. This sum shall be first paid from [husband]'s half of the remaining equity from the sale of the family residence pursuant to . . . Section 271(c) presently held in trust; and the remaining balance in that trust, if any, applied to [husband]'s attorney fee or costs obligation to [wife] pursuant to . . . Section 2032(c)."

Appeals

Husband appeals from both the denial of his first motion to modify his support obligations (C077676), and from the judgment (C079252). In her respondent's brief on the appeal from the judgment, wife "calls into question the [husband]'s ability to appeal due to Disentitlement." We note that, on June 28, 2016, wife filed a motion in this court to dismiss the appeal from the judgment based on the disentitlement doctrine. (See, e.g., *In re Marriage of Hofer* (2012) 208 Cal.App.4th 454, 459 [in marital dissolution proceeding, dismissing the husband's appeal, under the disentitlement doctrine, from an order directing him to pay attorney fees and costs where he willfully and persistently disobeyed three trial court discovery orders].) Wife argued that husband should not be

allowed to benefit from an appeal and the court process while he was in knowing and willful violation of trial court orders, specifically support orders, and orders directing him to pay attorney fees. On August 8, 2016, this court denied wife's motion to dismiss husband's appeal from the judgment.

In his reply brief on the appeal from the judgment, husband asserts that certain documents contained in wife's appendix, including postjudgment submissions, are improperly included and should be struck or disregarded. To the extent that materials are improperly included in wife's appendix, we have not considered them.

DISCUSSION

I. Imputation of Income—Child and Spousal Support

A. Husband's Contentions

In the appeal from the judgment, husband asserts that the trial court abused its discretion in imputing income to him because there was not substantial evidence that he had the ability *and the opportunity* to earn more than $600,000 per year. Husband asserts that wife had the burden of proving that he had the ability and opportunity to earn the amount imputed to him, and she offered no competent evidence regarding his earning capacity. He emphasizes that wife presented no expert testimony to prove his earning capacity, asserts that expert testimony was required on this issue, and notes that the trial court acknowledged the lack of expert testimony. He contends that the only competent evidence concerning his income was evidence of his previous income.

In the trial court, wife's theory for imputation was that "[i]ncome should be imputed to [husband] based on his earning capacity, as proven by his earning history." She originally asserted that it was reasonable to impute at least $925,971 to husband, "to bring his income back to the place it was in 2009, his highest earning year during the marriage." Later, during her trial testimony, she urged the court to impute $847,000, the three-year average when husband was working as a full-time surgeon in 2007, 2008, and

2009. The trial court utilized its own method of imputation, which husband challenges on appeal.

Husband argues that, by taking an average of the practice's gross earnings over five years, concluding that husband's income amounted to a particular percentage of those gross receipts, and estimating that percentage, the trial court based its imputation determination not on evidence presented at trial, but based on its own conclusions as, essentially, "an undisclosed expert witness for" wife. Husband contends that, "[c]omputing [husband]'s earning capacity as a function of gross receipts is not within the common knowledge of laymen or even judges" and "[h]ad a layperson sought to testify as to the percentage of gross income [husband] could or should be netting, such would have been excluded as an improper opinion." Husband asserts that the trial court pulled the 28.25 percent of the gross receipts which it concluded constituted husband's income "from thin air." He argues that the trial court's decision is particularly "egregious" because if an expert had actually testified that husband should be earning a percentage of the group's gross receipts, he could have cross-examined the expert on that topic and specifically inquired as to how expenses factored into the analysis. He emphasizes that his income is the net of all expenses and that expenses increased between 2009 and 2010 and was trending to increase in 2012.[10] He further argues that the income imputed by the court was speculative because there was no evidence indicating how many hours husband would have to work to earn that income.

Additionally, husband argues that the trial court should not have ignored the numerous factors outside of his control which led to the decrease in the practice's revenue, including the recession, the losses of insurance payments, the loss of the Sutter

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[10] In support of this assertion, husband points to exhibit U at page 6, which he says shows the operating expenses were $1,440,888 in 2009, $1,557,820 in 2010, and projected to be $1,596,959 in 2012.

contract, and the termination of husband's $100,000 directorship at Sutter. According to husband, the trial court acknowledged these factors, but simply disregarded them. Husband contends that there was no evidence presented at trial to establish that he could earn income in another position outside of his practice. He also maintains that substantial evidence does not support the trial court's conclusion that he willfully and intentionally decreased his income.

We agree with husband that the trial court erred in its imputation of income. There is not substantial evidence supporting the trial court's imputation.

B. Applicable General Principles of Law and Standard of Review

Relevant to child support, "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (§ 4058, subd. (b).) Income may also be imputed to the payee spouse in making an award of spousal support. (See, e.g., *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 308-309 (*Cheriton*) [trial court did not abuse its discretion in imputing income to spouse for purposes of spousal support award]; see also § 4320 [circumstances to be considered in ordering spousal support].) "[S]ection 4058 expressly authorizes the court to attribute income, without regard to deliberate attempts to reduce income." (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1392.)

We review a trial court's imputation of income for abuse of discretion. (*In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1079 (*Berger*).) Under this abuse of discretion standard, an " 'appellate court should not substitute its own judgment for that of the trial court; it should determine only if any judge reasonably could have made such an order.' " (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 994.) "[W]e consider only 'whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.' " (*Berger*, at p. 1079.) However, as this court long ago emphasized, "figures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation."

(*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 931 (*Cohn*); accord, *In re Marriage of Usher* (2016) 6 Cal.App.5th 347, 361; *In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 82.)

Previously, in considering " 'earning capacity,' " courts applied a " 'three-prong test before the capacity to earn standard may be applied.' The three prongs were: 'ability to work,' 'willingness to work,' and 'opportunity to work which means an employer who is willing to hire.' " (*In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1302 (*Bardzik*), quoting *In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 1372 (*Regnery*).) "Later courts, recognizing that the second element, willingness to work, should be taken for granted, recast *Regnery*'s three-prong test as a simple two-prong test: ability and opportunity." (*Bardzik*, at p. 1302.) Thus, "income cannot be imputed based upon a party's earning 'capacity' absent proof of *both* ability *and opportunity* to earn the income on a going-forward basis." (*Berger, supra*, 170 Cal.App.4th at p. 1079, second italics added.)

"The parent seeking to impute income must show that the other parent has the ability or qualifications to perform a job paying the income to be imputed *and the opportunity* to obtain that job, i.e., there is an available position. The parent seeking to impute income, however, does not bear the burden to show the other parent would have obtained employment if it had been sought." (*In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1247, italics added.) " 'The "opportunity to work" exists when there is substantial evidence of a reasonable "likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income." ' " (*Id*. at p. 1246; *Cohn, supra*, 65 Cal.App.4th at p. 930.) However, once the opportunity to work is established, the opportunity to earn a specific amount of income must also be established. Thus, as this court has previously observed, " '[t]he dispositive question is whether the evidence will sustain the inference that the party charged with support could,

with reasonable effort, obtain employment generating the postulated . . . income.' " (*Cohn*, at p. 930.)

C. Analysis

Husband argues that expert testimony was required for the imputation of income to him. While we have not discovered case law expressly stating that expert testimony is required for the proper imputation of income in circumstances such as those presented here involving a professional medical practice and physician, it would seem that testimony about earning capacity, a spouse's qualifications, and opportunities for employment typically would call for testimony from a witness with "special knowledge, skill, experience, training, or education" on the subject sufficient to render a witness competent to offer an opinion on these matters. (See Evid. Code, § 720, subd. (a).)[11] This seems particularly true where, as here, the income is imputed from the obligor spouse's ongoing business or professional practice or from the spouse's opportunities to obtain outside employment in his profession. Indeed, while our review of the relevant case law may not have disclosed a case expressly stating that expert opinion testimony is *required*, the published cases typically turn on, at least partially, the existence or absence of expert evidence.

In *Berger, supra*, 170 Cal.App.4th 1070, the Court of Appeal, discussing *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1380 (*Mosley*), stated: "The [*Mosley*] court nonetheless concluded it was proper to impute income to [the wife] based upon her earning capacity. But the court did not decide it was proper to impute earnings based upon the mere fact the wife had *once* earned an income. Instead, what the court found to

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[11] Evidence Code section 720, subdivision (a), provides in pertinent part: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

be sufficient was expert opinion evidence addressing the specific issue of her capacity to earn income *in the future*: As the court noted, '[The husband] provided a vocational evaluation summary demonstrating that [the wife] had a substantial earning capacity. He also provided the testimony of the vocational expert who had prepared the summary, and who had interviewed [the wife] as part of the evaluation process. . . . ' [Citation.] That type of evidence, demonstrating an analysis of the spouse's qualifications, as well as the opportunities currently available in the job market, is a far cry from evidence merely establishing that the spouse had once earned a certain salary, and thus presumably could again—which is the only evidence [the wife] presented to the trial court here, in her effort to demonstrate [the husband]'s theoretical earning capacity in the world of finance." (*Berger*, at p. 1080.)

In *Mosley*, both spouses were attorneys, and husband successfully sought to have income imputed to the wife, who, at the time of dissolution, had been a stay-at-home mother. (*Mosley, supra*, 165 Cal.App.4th at p. 1379.) He asserted that if she contributed to the support of their children, he would not have to spend so much time at work and would be able to spend more time with the children. (*Id*. at p. 1390.)

In *Berger*, the obligor spouse had been employed in the financial services industry by PricewaterhouseCoopers making $600,000 per year, but voluntarily left to start his own landscaping business, resulting in a significant decrease in income. (*Berger*, *supra*, 170 Cal.App.4th at pp. 1075-1076.) The *Berger* court observed that "income cannot be imputed based upon a party's earning 'capacity' absent proof of *both* ability and opportunity to earn the income on a going-forward basis," and stated that "the burden of proof for imputation of income cannot be met by evidence establishing merely that a spouse continues to possesses the skills and qualifications that had made it possible to earn certain salary in the past—even where it was undisputed that the spouse had voluntarily left that prior position." (*Id*. at p. 1079.) The court reasoned, "[The wife] points to absolutely no evidence suggesting, let alone demonstrating beyond dispute, that

[the husband] could have resumed that work . . . at his prior salary, even had he wished to do so. It is possible, certainly, that [the husband]'s particular skills and experience would make it likely that he could earn similar sums in the future, but that probability must be *evidenced*, not merely suspected." (*Ibid*.) Thus, "it would be improper to impute to [husband] the income he had formerly earned in the finance industry in the absence of evidence demonstrating he could *still* earn such an income if he were to return to that industry today." (*Id*. at p. 1074.) As noted, the *Berger* court, by citing *Mosley*, observed that a vocational evaluation and testimony by a vocational expert is the type of evidence that could establish, among other things, opportunity, but such evidence was missing in *Berger*. Such evidence is missing here as well.

In *Bardzik, supra*, 165 Cal.App.4th 1291, the court affirmed the trial court's denial of imputation of income and in doing so stated: "Conspicuously absent are the sorts of things that helped parents seeking imputation to carry their burden in [other cases], e.g., the imputee's resume, want ads for persons with the credentials of the potential imputee, *opinion testimony* (*e.g., from a professional job counselor*) that a person with the imputee's credentials could readily secure a job with a given employer (or set of employers), or pay scales correlating ability and opportunity with the income to be imputed." (*Id*. at p. 1309, italics added.) The court further emphasized, "[n]or was there any vocational examination." (*Ibid*.)

In *Cheriton, supra*, 92 Cal.App.4th 269, the Court of Appeal reversed the judgment upon, inter alia, determining that the trial court failed to consider whether imputing income to the custodial and obligor spouse was in the best interest of the children. (*Id*. at pp. 300-302.) While determining that the trial court failed to consider the best interest of the children, the *Cheriton* court stated: "Certainly, the record in this case contains substantial evidence of [the obligor spouse]'s earning capacity, including expert testimony on the" relevant factors. (*Id*. at p. 301.)

A case seemingly not involving expert testimony is *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331 (*LaBass & Munsee*). Given the nature of the profession at issue there and the available evidence establishing opportunity, *LaBass & Munsee* represents an example of the kind of case where expert testimony might not be required. In that case, the court affirmed the trial court's imputation of income to the wife. (*Id*. at pp. 1337-1339, 1341.) "At the hearing in the trial court evidence was introduced that: (1) [the wife] had a bachelor's degree plus 70 units as well as an emergency teaching credential allowing her to substitute teach anywhere in the Los Angeles School District, regardless of subject matter; (2) there were numerous job opportunities for full-time teachers in the greater Los Angeles area; and (3) the starting salary for a teacher with [the wife]'s credentials was $31,753 per year." (*Id*. at p. 1338.) There was also evidence tending to prove that the wife intended to avoid working full time. (*Ibid*.) A panel of this court concluded that there was substantial evidence supporting the trial court's implied finding that the wife had the ability and opportunity to work full time but was unwilling to do so. (*Ibid*.)

In *LaBass & Munsee*, want ads and the husband's own testimony proved the wife's opportunity to secure a teaching position. The court reasoned that newspaper want ads were properly admitted for the nonhearsay purpose of showing the existence of offers to bargain and further stated: "Also, the ads corroborated [the husband]'s opinion testimony regarding the availability of teaching positions. [The husband] had some knowledge upon which to form this opinion, since he himself recently taught in the Los Angeles School District. Opinion testimony may be based on hearsay as long as it is reasonably reliable." (*LaBass & Munsee, supra*, 56 Cal.App.4th at p. 1339, fn. omitted.) The *LaBass & Munsee* court concluded, in part, that the husband "showed that [the wife] was able and qualified for work as a teacher, that there were vacancies for teachers in the Los Angeles School District and that [the wife] had child care available. These facts were sufficient for the court to apply section 4058(b)." (*LaBass & Munsee*, at p. 1339.)

There is no reference in the opinion to expert testimony in *LaBass & Munsee*.[12] However, the case involved employment in a profession about which there is widespread common knowledge, there was readily available evidence concerning job opportunities, and the husband was competent to testify on the issue based on his own personal knowledge, background, and experience. There is no comparable evidence in this case. This case involves a far more complex situation—the potential for earning income in the future in an ongoing professional practice owned by the obligor spouse or earning income from an outside employer seeking to hire a professional with the obligor spouse's abilities.

In any event, while expert testimony will typically be the way in which a party may carry his or her burden in seeking the imputation of income, it is possible that it is not required in every case. Thus, we reject husband's contention that it is *always* required. What is required is competent evidence relevant to all determinations to be made. In this particular case, whether presented by a witness qualified as an expert or not, wife was required to present competent evidence to establish husband's ability *and opportunity* to earn the imputed income. (See *Cohn, supra*, 65 Cal.App.4th at p. 931; *Berger, supra*, 170 Cal.App.4th at p. 1079.)

Here, the only evidence offered, and relied on by the court, in imputing income to husband in the amount of $600,160, was an aggregation and averaging of husband's prior earning history at Rubin Orthopedics, as a percentage of gross receipts, focused on a five-year period. There was no expert testimony offered at trial on the subject of husband's earning capacity. There was no testimony by a vocational expert. There was no vocational evaluation or report offered on the subject. Nor was there any other evidence

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[12] There is no indication in *LaBass & Munsee* whether the trial court qualified the husband as an expert for purposes of this testimony, or if instead it permitted him to testify as to his opinion as a lay witness pursuant to Evidence Code section 800.

presented to the trial court offering an analysis of husband's current earning capacity, based on both his ability to earn *and* opportunity to earn.

Moreover, there was insufficient evidence presented regarding what, if any, positions were available outside of husband's practice to someone with husband's experience and training, and the compensation for those positions. Such evidence would have been helpful in this case given the dramatic decline in the revenue at Rubin Orthopedics, the resulting decline in husband's income, and, particularly, the allegation that husband deliberately orchestrated the precipitous decline in his income for the sole purpose of avoiding paying support to wife. Marsha Summers testified that, when she researched employment opportunities for orthopedists in Sacramento, she discovered very few of them. Kaiser was hiring for a position in Roseville, and the Veterans Administration hospital was hiring. The position at Kaiser paid $400,000, over $200,000 less than the court's imputation. Summers did not know how much the Veterans Administration hospital position paid. Introduced into evidence was an e-mail dated August 15, 2013, thanking husband for applying for a position as an orthopedic surgeon with "The Permanente Medical Group," but informing him that, based on his "current practice profile and the limited volume of operative cases [he] [was] currently performing," husband lacked the "adequate recent experience and current skill set to function well in [the] active, high volume surgical practice." The reason husband was rejected by Kaiser may have been relevant to both husband's ability and his potential opportunity for similar jobs, or more accurately, the lack of opportunity to find employment in his profession elsewhere. This is exactly the kind of evidence about which an expert could provide illuminating testimony.

Husband acknowledged that he had not applied for a specific or advertised position at Kaiser; he had simply submitted his resume. But husband also testified that he consulted a recruiter who told him she was not aware of any openings for a pediatric orthopedic surgeon in the greater Sacramento area, and, when he asked about the San

Francisco area, the recruiter responded, "not much out there." There was no other evidence presented that was relevant to the issue of husband's opportunity to earn outside of his practice.

As husband emphasizes, Darren Silva, wife's expert, specifically testified that he did not perform a fair-compensation analysis of husband because he was not provided with sufficient data to do so. When husband's attorney began to inquire of vocational evaluator Naomi Kinert whether she researched salary information for medical directors and surgeons, wife's attorney successfully objected on the grounds that Kinert was testifying as an expert relative to her evaluation of wife, not husband, she had no expertise concerning husband's personal career, and the information sought to be elicited was outside the scope of what Kinert was hired to do. Summers also did not testify about reasonable compensation for husband; wife's attorney withdrew her question addressing compensation following husband's attorney's objections.

The evidentiary shortcomings in *Bardzik* and *Berger* are evident here. Despite the length of the trial and the resources exhausted, there was little to no competent evidence actually relevant to the primary issue of imputation of income to husband. While there was evidence addressing husband's qualifications, which was relevant on the issue of his ability to earn, the evidence was wholly insufficient as to husband's opportunity to earn under all of the relevant circumstances. The evidence established only a past history of husband's earnings at his closely held practice, which was experiencing substantial, even existential, changes and that he "continue[d] to possesses the skills and qualifications that had made it possible to earn a certain salary in the past." (*Berger, supra,* 170 Cal.App.4th at p. 1079.) This evidence was insufficient to meet wife's burden as the party seeking imputation.

It must be emphasized that wife's burden was not only to show the existence of an opportunity to earn, but wife was also required to introduce evidence establishing an opportunity to earn the actual income imputed to husband. In *Cohn, supra*, 65

Cal.App.4th 923, the husband was an attorney who had lost his high paying job with a group of real estate investment companies. (*Id*. at pp. 925-926.) After an exhaustive job search and an unsuccessful solo practice in Hayward, he planned to open a solo office in Sacramento. (*Id*. at pp. 926-927.) While the *Cohn* court concluded there was substantial evidence of ability and opportunity to work, it concluded that there was no substantial evidence supporting the trial court's imputation of $40,000 per year. (*Id*. at pp. 929-931.) Figures for earning capacity, this court said, "cannot be drawn from thin air; they must have some tangible evidentiary foundation." (*Id*. at p. 931.)

In the amended statement of decision, the trial court noted that it was difficult to determine earning capacity in part because wife did not present "an expert i[n] discerning where on the . . . continuum of [husband]'s *earning capacity* based on his historic earnings a particular *amount certain* lies upon which orders shall properly issue." (Fn. omitted.) In the original statement of decision, the court "acknowledge[d] each party's lack of an expert but, in an effort to discharge its obligations on the evidence presented, applied common and basic arithmetical principles pursuant to Evidence Code section 451(f)."**13** Almost identical language appears in the amended statement of decision. The court further stated that, while husband had objected on the basis of wife's failure to present an expert, "such failure does not supplant the court's obligation to consider evidence adduced at hearing in determining, where able, the issues posed by the parties."**14**

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13 Under Evidence Code section 451, subdivision (f), judicial notice shall be taken of "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute."

14 We note that the trial court did not appoint an expert under Evidence Code section 730. Nor did the court order a vocational examination. (See 1 Hogoboom et al., Cal. Practice Guide: Family Law (The Rutter Group 2018) ¶ 6:455.9, at pp. 6-295 to 6-296 (Hogoboom) [one way to establish earning capacity for salaried employees or self-

However, even if we were inclined to take judicial notice of the mathematical computations themselves (see, e.g., *Arden Carmichael, Inc. v. County of Sacramento* (2001) 93 Cal.App.4th 507, 513, fn. 9 [granting plaintiffs' request to take judicial notice of simple mathematical calculation pursuant to, inter alia, Evid. Code, § 452, subd. (h)]), we agree with husband that the trial court did far more than take judicial notice of simple mathematical calculations. Determining husband's earning capacity by averaging his practice's gross receipts over a specified period, selecting a percentage of those gross receipts within the range experienced over that time as representing husband's income share over that period, and applying that percentage to the average, is a matter that goes beyond "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute," such that this determination may be the subject of judicial notice. (Evid. Code, § 451, subd. (f); see *Barreiro v. State Bar* (1970) 2 Cal.3d 912, 925 [judicial notice may not be taken of any matter unless authorized or required by law; if there is any doubt either as to the fact itself or as to its being a matter of common knowledge, evidence should be required]; see also *Varcoe v. Lee* (1919) 180 Cal. 338, 344 [judicial notice is a shortcut, a doing away with the formal necessity for evidence, because there is no real necessity for it; so far as matters of common knowledge are concerned, it is saying there is no need of formally offering evidence of those things, because practically everyone knows them and there can be no question about them].) Moreover, under the circumstances of this case, such computations, even if arguably demonstrative of husband's ability to earn, are at best marginally relevant to husband's opportunity to earn the specified income. (See, e.g., *Berger, supra,* 170 Cal.App.4th at p. 1079.)

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employed persons "is to have a qualified expert perform a vocational examination (akin to that authorized in [section] 4331, [subdivision] (a) in connection with spousal support, . . . and conduct a job survey of available employment opportunities for a person with the obligor's skills, experience, background, etc."].)

While the trial court recited that, based on the evidence presented, husband "clearly possesses the ability to work, the willingness to work, and the opportunity to work," we conclude that there was insufficient competent evidence presented at trial to enable the trial court to reach its determination concerning the opportunity to earn the income it imputed to husband. Accordingly, the support orders must be reversed and the matter remanded for a new determination of husband's income or earning capacity and a recalculation of his support obligations. Upon remand, the parties should be given an opportunity to present evidence, including expert testimony, or the court in its exercise of discretion may appoint and expert (see fn. 14, *ante*) to give an opinion concerning husband's earning capacity. Also, we recognize that on remand, it could be that the court will have a much better "track record" from which to view this issue given the passage of time and the occurrence of intervening events. (*Cohn, supra*, 65 Cal.App.4th at p. 931 [concluding that on remand, trial court would have "a much better track record" to determine earning capacity based on a husband having practiced law as a solo practitioner in a new location for more than a year].) Indeed, it may no longer be necessary to impute income given the circumstances that may exist after remand.

II. Work Schedule and the Best Interest of the Children

A. Husband's Contentions

Husband asserts that the trial court's imputation of income was improper because there was insufficient evidence that the trial court's imputation was in the children's best interests, particularly given that husband had shared custody of the children. Husband further asserts that the imputation was based on an objectively unreasonable work schedule, which would require him to work extraordinary and onerous hours. Husband emphasizes that he requested the trial court to make findings regarding the best interest of the children and the number of hours he would be required to work, but the court failed to do so.

B. Best Interest of the Children

"[N]o authority permits a court to impute earning capacity to a parent unless doing so is in the best interest of the children. By explicit statutory direction, the court's determination of earning capacity must be 'consistent with the best interest of the children.' " (*Cheriton, supra*, 92 Cal.App.4th at p. 301, quoting § 4058, subd. (b).)[15]

Here, the trial court acknowledged that it must consider the best interest of the children in imputing income to husband, a 50-percent custodial parent. However, the trial court then proceeded to discuss the maxim that a parent cannot " ' " 'divest himself [or herself] of his [or her] earning ability at the expense of . . . minor children' " ' " (*LaBass & Munsee, supra*, 56 Cal.App.4th at p. 1339), and its conclusion that the husband contributed to the diminution in his income. While it is certainly the case that a parent has the duty to support his or her children in a manner suitable to the children's circumstances (§ 3900), the fact that husband had such a duty coupled with his earning history is not the extent of the inquiry into the best interest of the children in such circumstances. The trial court must consider all of the evidence before it in evaluating the best interests of the children. (*Mosley, supra*, 165 Cal.App.4th at p. 1390.) It may be, as the trial court found, that the children would benefit from a standard of living furnished, in part, by husband's court-ordered support which would "further[] their circumstances." However, "sometimes 'the "best interests of the children" are promoted when parents [reduce their work hours] so as to be able to spend more time with their children.' " (*Ibid.*, quoting *Bardzik, supra*, 165 Cal.App.4th at p. 1311.) While we are not *finding* this to be the case here, we are not persuaded that the trial court considered all of the evidence and circumstances in weighing the best interest of the children in imputing income to husband. We conclude that, while the trial court stated that it was

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[15] A spousal support award does not require the trial court to take the children's best interest into consideration. (*Mosley, supra*, 165 Cal.App.4th at p. 1390.)

taking the children's best interest into consideration, it did not make an express finding supported by substantial evidence that the work schedule required to earn the income imputed to the husband was indeed in the children's best interest. (*In re Marriage of Ficke* (2013) 217 Cal.App.4th 10, 13 [trial court abused its discretion in imputing income to the mother without an express finding supported by substantial evidence that imputation would benefit the children].) Indeed, as we next discuss, the trial court made no finding whatsoever as to the number of hours husband would have to work to earn the income the trial court imputed to him, other than stating that husband "consistent with the demands of his profession has and does work *more* than 40 hours a week." (Fn. omitted.)

C. Extraordinary or Onerous Work Schedule

As husband asserts, the trial court did not make clear that it considered whether the income actually imputed to husband would require him to work an extraordinary or onerous number of hours.[16]

In *In re Marriage of Simpson* (1992) 4 Cal.4th 225 (*Simpson*), our high court stated: "In the present case, the question presented is whether 'earning capacity' should, as a general matter, properly be measured by the work regimen engaged in by the supporting spouse during the marriage even if such regimen was extraordinary, requiring excessive hours or an onerous work schedule. We conclude that earning capacity generally should not be based upon an extraordinary work regimen, but instead upon an

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16 Indeed, there was evidence submitted in his motion to modify indicating that husband's work schedule in 2008 and 2009 was unsustainable. Dr. Polansky, one of the managers at the Greater Sacramento Surgery Center where husband performed surgeries, stated in a declaration that he had never seen a surgeon at that location work the number of hours husband worked in 2008 and 2009. According to Dr. Polansky, husband was performing an "enormous number of surgeries," often beginning at 7:00 a.m., and not finishing until 10:00 p.m. Dr. Polansky even spoke to husband, cautioning him about the risk of "burn[ing] out" and advising him that the workload he was carrying at that time was unsustainable.

objectively reasonable work regimen as it would exist at the time the determination of support is made." (*Id*. at pp. 234-235.) Our high court went on to state: "A reasonable work regimen, as opposed to an extraordinary regimen . . . is not readily or precisely determined and is dependent upon all relevant circumstances, including the choice of jobs available within a particular occupation, working hours, and working conditions. Established employment norms, such as the standard 40-hour work week, are not controlling but are pertinent to this determination. In certain occupations a normal work week necessarily will require in excess of 40 hours or occasional overtime and thus perhaps an amount of time and effort which may be considered reasonable under the circumstances. A regimen requiring excessive hours or continuous, substantial overtime, however, generally should be considered extraordinary." (*Id*. at pp. 235-236, fn. omitted.)

We agree with husband that it does not appear that the court expressly determined that he was able to earn the amount it imputed to him by working a reasonable number of hours. (See *Simpson, supra*, 4 Cal.4th at pp. 235-236.) Indeed, as we have noted, the trial court made no findings as to the number of hours he would have to work to earn the income imputed to him. The court did quote *Simpson* in stating that "[a] more appropriate measure" of husband's earning capacity would require the court to consider what husband " 'would have earned had he worked at a reasonably human pace.' " (*Id*. at p. 235, quoting *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 493.) However, it is not clear from the amended statement of decision that the trial court actually found that the amount of income it imputed to husband did not require an extraordinary or onerous work schedule.

D. Conclusion

On remand, in determining whether to impute income to husband and, if so, how much, in addition to the requirements that the trial court evaluate husband's ability and opportunity to earn, the court must consider whether the schedule husband must work to

earn the amount to be imputed to him is reasonable and whether that schedule is in the best interest of the children. In making this determination, the trial court must keep in mind our high court's admonition that courts "should not penalize . . . a supporting spouse who voluntarily has undertaken an extraordinary rigorous work regime during the marriage, by locking that spouse into an excessively onerous work schedule." (*Simpson, supra,* 4 Cal.4th at p. 228.)

III. Admission into Evidence of Husband's "Wish List"

During wife's testimony, her attorney sought to have the "wish list" prepared by husband during the course of marriage therapy admitted into evidence. We address this issue for guidance for the trial court on remand. *Based on the record before us*, we conclude that some of the items on the wish list were admissible and any error in allowing those that were not admissible was harmless.

A. Additional Background

Husband's attorney objected to the introduction of the wish list into evidence on the ground that it was irrelevant, emphasizing that California is a no-fault state. Wife's attorney acknowledged that California is a no-fault state, but argued that the wish list was relevant to husband's case-in-chief, and wife's contention that husband deliberately reduced his income because he did not want to work to pay her support. Wife's attorney argued that, after the abortion, and after wife tendered a $20,000 deposit to a divorce attorney, husband talked her into therapy, but set 19 conditions, set forth in the wish list, for the continuation of the marriage. Wife's attorney contended that this was relevant to husband's repeated representations to wife that, if she divorced him, he would not work to pay her. According to wife's attorney, the wish list was relevant to wife's argument that husband's income did not drop 89 percent based on outside forces, but because he intended to "punish [wife] so severely that [she] will rue the day [she] ever divorced" him. Counsel added: "The Court has to receive [the wish list] to fully and completely

appreciate the control that [husband] as exacted upon [wife] over this marriage and the punishment that she had to receive for having the gall to step out of it and finally end it."

During argument on the objection, the trial court stated: "I think what it would at least establish might be the motivation why—why he, despite his claims of the fiscal issues that he testified to earlier with regard to his practice, that coincidentally there's this significant decrease in income that sort of confirms the 200 times that I'm saying 'I'm not going to work to pay you,' and the kind of demands that you make on someone so that you have this fiscal . . . hammer over them." The court went on to point out items on the list that could be considered monetary demands.

The trial court admitted the wish list into evidence, ruling: "If it were only this, I would totally agree with you [husband's attorney]. But in the context -- let me put it in another way. One of the advantages that I've discovered in family law and court trials, as much as I certainly don't enjoy cases that extend over months, is that you get to glimpse what a couple is like. You get a significant picture as opposed to a case that lasts only two or three days, and you get to get a sense of what the parties are like in that relationship, which gives you a significant incite [*sic*] into demeanor, state of mind, motive, the sorts of things that sometimes elude you as a judicial officer because we're in and we're out within generally minutes. [¶] If this were the only document that was being offered without the context that I've had over the course of this case, I would totally agree with you. It would not be admitted. But having had the advantage of even witnessing your own client's demeanor, comments that he's shared, this is coming in. Objection's overruled."

The wish list read as follows: "[Husband]'s Wish List of things he wants from [Wife]: [¶] 1. Get $20,000.00 back from divorce attorney and put in our joint account so we can pay bills such as mortgage, water, electrical, gas, food, etc. [¶] 2. Provide me with daily option of good quality sex or oral sex. [¶] 3. Allow me to hold you or you hold me at night either while going to sleep or in the middle of the night. [¶] 4. Give me

the option of having another child. [¶] 5. Never have another abortion without my consent. [¶] 6. Allow unprotected sex, as long as you promise not to have an abortion. [¶] 7. Allow an in house housekeeper/nanny/tutor. [¶] 8. Get a job and contribute proportionately to all shared bills and pays [*sic*] for your own expenses out of your own money (e.g. cell phone bill, Arden Hills Country Club membership) [¶] 9. Do not require or expect me to go on trips with your family and one of our children stays with me during any such trips you go on. [¶] 10. Do not place any expectations or obligations on me in terms of earning money. [¶] 11. Always give me the choice of not allowing Marley[17] to stay with us anymore. [¶] 12. Never attempt to kick me out of my home through legal means or otherwise. [¶] 13. Pick up tennis and squash and play both avidly. [¶] 14. Occasionally go dancing with me (once a year). [¶] 15. Go for a walk with me frequently (aim for once a day). [¶] 16. Do not file for a divorce. [¶] 17. Understand my job is stressful and support me emotionally and physically during tough times or through tough cases. [¶] 18. Laugh at my jokes. [¶] 19. Watch sports with me (TV and/or live), about once a month combined."

Both husband and wife testified that their therapist asked each of them to create a wish list for their marriage counseling. Husband testified that it was not intended to be a list of demands and he did not physically give the wish list to wife. According to husband, at the direction of their therapist, each of them read their wish lists to the other during a therapy session, although husband did not remember whether he read every item to wife. Wife testified that husband's list was provided to her during therapy.

Wife testified that the wish list "horrified" her. Some items on the list were "upsetting" to her and "shed a whole new light on my marriage and the person who I was married to." Wife considered it a list of "demands." She testified that she understood the

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17 Marley apparently refers to wife's dog, which she had prior to the couple being married.

items on the list represented "what he wanted me to do or he—I mean, he wasn't going to be nice to me. He was—we might get a divorce. . . . This is what he wanted from me . . . in this marriage." However, wife acknowledged that the therapist did not tell the couple to write out a list of demands that must be fulfilled, but rather to "try to get everything on the table," more like "[t]hese are all the things I would love to have from you."

Nevertheless, husband's list felt more like demands to wife. Some of the items on the list were often repeated by husband, "especially about the $20,000 or sex." Husband repeated these things "nightly," waking her up to do so. Wife testified that husband often woke her up "in the middle of the night to discuss anything that he felt like—he felt like he needed to have control over me." It happened more frequently and for greater lengths of time after the abortion. She testified that husband woke her to talk about the abortion, "talking to me about why I did it; would I have another child with him; that he wasn't going to be able to get past this; that he—he wasn't—he just -- it was too much for him." Additionally, he was "demanding" and complained that she was not doing anything right, "Like I wasn't opening the shades in the morning at the right time; I wasn't putting water in his car; you know, the issues with the kids. It just—just constantly—it—I mean, the worst part of it was mainly the being woken up at 3:00 in the morning when he wanted to discuss why I did this and how things just weren't going to work out because of it." Sometimes husband yelled and sometimes he called her a "bitch" during these conversations. It got so bad at one point, that when he woke her up she had to call husband's father to tell him, " 'It's enough. . . . your son is waking me up. Deal with him." She testified, "I was being harassed nightly. I was intimidated by him."

B. Husband's Contentions

Husband asserts that the trial court erred in admitting the wish list, as well as related evidence of fault, into evidence. He asserts that it was not relevant to any matter at issue in this trial which concerned only financial matters. He further asserts that the wish list should have been precluded by section 2335 and Evidence Code section 1101,

as it constituted bad character/misconduct evidence. Husband also asserts that the wish list was not relevant under section 4320, and further asserts that his conduct about which wife complained did not constitute domestic violence within the meaning of sections 4320, subdivision (i), and 6211. Husband emphasizes that the trial court quoted and clearly relied upon the wish list in reaching its determinations. Husband asserts that, because it cannot be determined the extent to which the court's findings predicated on the wish list and related evidence contributed to the award of spousal support, the admission of this evidence was not harmless and the award should be reversed. He further argues that we should expressly find that there is no evidence of domestic violence or abuse, and the matter should be remanded.

C. Analysis

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) " 'Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. [Citations.] Speaking more particularly, it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question.' " (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.)

Regarding husband's contention that this evidence should have been precluded by section 2335, that section provides: "*Except as otherwise provided by statute*, in a pleading or proceeding for dissolution of marriage or legal separation of the parties, including depositions and discovery proceedings, evidence of specific acts of misconduct is improper and inadmissible." (Italics added.) However, husband "ignores the first

phrase of section 2335. . . . Section 4320 governs the award of spousal support." (*In re Marriage of Schu* (2016) 6 Cal.App.5th 470, 474 (*Schu*).)[18]

"Dissolution of marriage may be 'no fault.' But there is an element of fault in the award of spousal support." (*Schu, supra,* 6 Cal.App.5th at p. 474, citing Hogoboom, *supra,* ¶ 6:824, p. 6-417 [" 'Notwithstanding the "no fault" mandate, probative evidence "in the nature of fault" often comes up in contested spousal support cases' "].) "Section 4320, subdivision (a) provides that the court 'may' order spousal support. Spousal support is not mandatory in every case. The facts and equities in a particular case may call for no spousal support or very short-term support. [Citation.] Section 4320 provides that the court '*shall* consider *all* of the following circumstances: . . . ' (Italics added.) One of those circumstances is domestic violence." (*Schu,* at p. 474; see also *In re Marriage of MacManus* (2010) 182 Cal.App.4th 330, 337-338 [noting that "domestic violence as a consideration for a spousal support award 'is another area where fault evidence is allowed in spousal support litigation' "].) To fulfill the statutory requirement of considering domestic violence, "the court must allow evidence of misconduct." (*Schu,* at p. 475.)

Subdivision (i) of section 4320 contains the domestic violence provision that the trial court relied upon here. It provides that the court shall consider "[d]ocumented evidence of any history of domestic violence, as defined in Section 6211, between the parties or perpetrated by either party against either party's child, including, but not

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[18] As for husband's contention that the subject evidence was inadmissible propensity/character evidence under Evidence Code section 1101, that objection is forfeited for failure to raise it in the trial court. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1208, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Goldman* (2014) 225 Cal.App.4th 950, 960.) Husband objected on grounds of relevance and that the evidence constituted inadmissible evidence of fault, which implicates section 2335, but he did not object on grounds that the evidence was prohibited by Evidence Code section 1101.

limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party." (§ 4320, subd. (i).)

Section 6211 defines " '[d]omestic violence' " as, inter alia, "abuse" perpetrated against a spouse or former spouse. (§ 6211, subd. (a).) At the time of this trial, section 6203 provided: "(a) For purposes of this act, 'abuse' means any of the following: [¶] (1) Intentionally or recklessly to cause or attempt to cause bodily injury. [¶] (2) Sexual assault. [¶] (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (4) *To engage in any behavior that has been or could be enjoined pursuant to Section 6320*. [¶] (b) Abuse is not limited to the actual infliction of physical injury or assault." (§ 6203, italics added.) Conduct that may be enjoined under section 6320 includes, "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering . . . , harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or *disturbing the peace of the other party* . . . ." (§ 6320, subd. (a), italics added.) "[T]he plain meaning of the phrase 'disturbing the peace of the other party' in section 6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497 (*Nadkarni*); *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146-1147.) Thus, "[m]ental abuse is relevant evidence." (*Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 821 (*Rodriguez*).) In *Rodriguez*, the court held that the trial court erred in ruling that "evidence of mental abuse and controlling behavior" was not relevant to the issuance of a Domestic Violence Protection Act (§ 6200 et seq. (DVPA)) restraining order. (*Rodriguez*, at p. 820.)

As husband notes, in its amended statement of decision, the trial court stated that it had admitted evidence as relevant to the section 4320 considerations, and the court further cited *Nadkarni* as well as Evidence Code sections 1101 and 1105.[19] The court stated that, "during the course of the marriage, [wife] lacked a 'voice'. She was subject to, inter alia, intimidation, threats, isolation, using the children, emotional abuse, economic control, and male privilege. She resided in a marital environment that can only be characterized as abusive within the context of domestic violence." (Fn. omitted.) The court subsequently noted that it considered section 4320, subdivision (i)—documented evidence of any history of domestic violence—and concluded that husband asserted "[e]motional and fiscal control" over wife. In reaching this determination, citing, inter alia, *Nadkarni*, the trial court stated, "Domestic violence, does not rest solely on violence or jeopardy to a victim's safety, but may include conduct that impacts the mental or

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[19] Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

Evidence Code section 1105 provides: "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom."

While the trial court addressed the domestic violence theory of relevance in its statement of decision, it did not explain these Evidence Code theories. And as we have noted, husband did not expressly object on the grounds of Evidence Code section 1101. Consequently, we do not address these Evidence Code theories here.

emotional calm of the victim." The trial court stated that such conduct can be verbal, and further stated: husband's "conduct as it affected [wife's] psyche was palpably evident during her testimony. While not physically abusive—[husband] has been emotionally abusive." The court in its amended statement of decision repeatedly referred to husband as controlling of wife. The court discussed husband's conduct following the abortion, including episodes of verbal abuse, being "emotionally accusatory," demanding "sex for stress," and being "particularly aggressive despite her discomfort," and the court further noted husband's denial that he abused wife. Husband disputed the notion that he was abusive, testifying that he never abused wife in any way.

In and of itself, the wish list would not be relevant under section 4320, subdivision (i), to show emotional abuse. It was, after all, created by husband at the direction of the couple's therapist. Thus, by itself the wish list would not be "behavior that has been or could be enjoined pursuant to Section 6320." (§ 6203, subd. (a)(4).) Stated differently, no court could issue a restraining order based on husband having shared the wish list items with wife during therapy. However, combined with wife's testimony about husband's controlling behavior and his repeated demands, some items on the wish list did have some "tendency in reason to prove" a fact of consequence to the determination of the action. (Evid. Code, § 210.) We agree with husband that some items on the wish list are benign and not relevant to the domestic violence consideration. Nor are those items relevant to any other consideration pertaining to spousal support.[20] However, other entries on the list combined with wife's testimony did have some

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[20] Among the items on the wish list that we would find benign, even coupled with wife's testimony concerning husband's behavior, are those expressing a desire that wife learn to play tennis or squash, go dancing with husband occasionally, go on frequent walks with husband, laugh at husband's jokes, and watch sports with husband. There is no evidence in the record before us indicating how these items contributed to disturbing wife's peace, i.e., destroyed her mental or emotional calm.

tendency in reason to prove husband was engaged in a course of conduct which disturbed the peace of wife, as it constituted conduct that destroyed her mental or emotional calm. (*Rodriguez, supra*, 243 Cal.App.4th at pp. 821-822; *Nadkarni, supra*, 173 Cal.App.4th at p. 1497.) For example, the monetary items, the items pertaining to their sexual relations, the items pertaining to the abortion and/or having another child appear from the evidence to have been repeated complaints by husband. Additionally, the item related to Marley, wife's dog, was relevant in this regard, as wife testified that husband did not like the dog or want the dog in the house, it "was a constant battle," and eventually husband had the dog euthanized without her knowledge or permission.

Husband asserts that there was no documented evidence of domestic violence, emphasizing that wife never sought a restraining order or made any report of domestic violence. Husband is correct that section 4320 does refer to "[d]ocumented evidence" of any history of domestic violence. (§ 4320, subd. (i).) However, husband does not develop this point or provide authority for the proposition that only evidence of a conviction, police report, or restraining order would constitute documented evidence of any history of domestic violence.

Additionally, as asserted by wife before the trial court, several items on the wish list are potentially relevant to fault in the context of husband's alleged efforts to diminish, or eliminate, his income in order to avoid his support obligations. Item Nos. 8 ("Get a job and contribute proportionately to all shared bills and pays [*sic*] for your own expenses out of your own money [e.g. cell phone bill, Arden Hills Country Club membership"]), 10 ("Do not place any expectations or obligations on me in terms of earning money"), and 16 ("Do not file for a divorce"), coupled with wife's testimony, could have some tendency in reason to prove (Evid. Code, § 210) husband intended to avoid his family financial responsibilities and told wife as much. (See *Simpson, supra*, 4 Cal.4th at pp. 233-234 [trial court properly considered the husband's deliberate shift to lesser-compensated work that was "motivated primarily by the desire to shirk his family

obligations"]; *Schu*, *supra*, 6 Cal.App.5th at p. 474 [there is an element of fault in the award of spousal support]; *Regnery*, *supra*, 214 Cal.App.3d at pp. 1373-1376 [the husband deliberately refused to pay support when able to do so, voluntarily left employment merely because he found it "arduous," and was unemployed for a long period of time during which his efforts to find work were limited and he was unwilling to make reasonable efforts to accept positions offered in industries other than his preferred industry; the evidence fully supports trial court's implied finding of deliberate avoidance of family financial responsibilities]; Hogoboom, *supra*, ¶ 6:824, p. 6-431 [notwithstanding the "no fault" mandate, evidence of fault often comes up in contested spousal support cases, including to prove supporting spouse is intentionally not earning up to his or her ability].)

Moreover, section 4320, subdivision (n), allows the trial court to consider "[a]ny other factors the court determines are just and equitable." In considering spousal support, under this catch-all provision, the trial court could properly consider evidence of fault, including wife's testimony combined with relevant items on the wish list. In *Schu*, the wife asserted that the catch-all provision of section 4320, subdivision (n), should be read "as containing an exception for the fault of a party." (*Schu, supra*, 6 Cal.App.5th at p. 475.) The *Schu* court concluded that section 4320, subdivision (n), "contains no such exception." (*Schu*, at p. 475.) Thus, in *Schu*, the Court of Appeal determined that the trial court was justified in denying the wife spousal support based on its consideration, pursuant to section 4320, subdivision (n), of evidence of the wife: having a sexual relationship with her minor son's minor friend; providing her son and his friends alcohol and showing them pornography; assaulting her minor daughter by having her held down and forcibly cutting off her hair; and telling her minor daughter that she would be removed from the home if she went to a counselor. (*Schu*, at pp. 472-473, 475.)

" 'In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of

accomplishing substantial justice for the parties in the case before it. "The issue of spousal support, including its purpose, is one which is truly personal to the parties." [Citation.] In awarding spousal support, the court must consider the mandatory guidelines of section 4320." (*In re Marriage of McLain* (2017) 7 Cal.App.5th 262, 269.) In light of the trial court's remarks set forth *ante*, while the court did not expressly rely on section 4320, subdivision (n), in considering the wish list and wife's related testimony, the court clearly felt it just and equitable to take this evidence into consideration.

Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence of the wish list entries and wife's related testimony. To the extent the trial court admitted entries from the wish list that were not relevant, *based on the record before us*, we conclude that any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see also *In re Celine R.* (2003) 31 Cal.4th 45, 60 [applying *Watson* in a dependency matter]; *Sabato v. Brooks* (2015) 242 Cal.App.4th 715, 724-725 [applying *Watson* harmless error/prejudice analysis in the context of an appeal from a DVPA restraining order].)

IV. Attorney Fees and Costs

As stated *ante*, in the attorney's fees and costs order attachment, the trial court directed husband to pay $488,000 in attorney fees and $37,500 in costs. Additionally, the attorney's fees and costs order attachment directed: "[Husband] shall pay [wife] attorney fees pursuant to . . . Section 271 in the sum of $75,000.00; and [wife] shall pay [husband] attorney fees pursuant to . . . Section 271 in the sum of $5,000.00; however, the two amounts shall be offset resulting in a singular . . . Section 271 award to [wife] in the sum of $70,000.00."

Husband asserts that, because of the errors by the court in imputing income based on his earning capacity for purposes of spousal and child support, the award of attorney fees and costs should be reversed and remanded for a redetermination of whether such an award is appropriate. We agree. We conclude that, because we are reversing the trial

court's support orders and remanding the matter for a determination of husband's income or earning capacity, we must also reverse the attorney fee and costs award for a determination of the relative needs of the parties following the court's resolution of that issue.

Attorney fees are awardable in dissolution proceedings based upon what is "just and reasonable under the relative circumstances of the respective parties." (§§ 2032, 2030.) Any such award must reflect (1) a determination of ability to pay and (2) the respective incomes and needs of the parties in order to "ensure that each party has access to legal representation . . . to preserve each party's rights . . . ." (§ 2030, subd. (a)(1).) Section 2030 is a need-based provision, the purpose of which is to "ensure that the parties have adequate resources to litigate the family law controversy and to effectuate the public policy favoring 'parity between spouses in their ability to obtain legal representation.' " (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827.)

Section 2030 expressly directs a court contemplating an award of attorney fees to consider, among other things, income and needs assessments of the parties, any disparity there may be in access to funds to retain counsel, whether one party is able to pay for the legal representation of both parties, and ability to pay. (§ 2030, subd. (a)(1)-(2).) Similarly, section 2032, requires the court to consider whether an award is "just and reasonable *under the relative circumstances of the respective parties*." (§ 2032, subd. (a), italics added.) Having concluded that we must reverse and remand the matter for a new determination of husband's income or earning capacity, we further conclude that the trial court must necessarily make a new determination on an award of attorney fees and costs based on the relative circumstances of the parties, any disparity in access to funds for counsel, and the parties' relative ability to pay. Determination of husband's income or earning capacity may impact the trial court's decision to award fees to wife and/or the amount of such award. Accordingly, we reverse the attorney fee and costs award to wife and remand this issue for the trial court to exercise its discretion in awarding attorney

fees and costs following its determination of husband's income or the amount of income to be imputed to husband.[21] (See *In re Marriage of Kochan* (2011) 193 Cal.App.4th 420, 431 [because we have determined that the trial court should revisit the issue of spousal support based on the husband's actual current income, and because the attorney fees issue is related to the parties' respective financial circumstances, the court should reconsider the award of attorney fees on remand, taking into consideration the husband's actual earnings].)

Section 271 contemplates an alternative basis for an award of attorney fees and costs where the conduct of a party or attorney "furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." (§ 271, subd. (a).) An award pursuant to section 271 is in the nature of a sanction. (§ 271, subd. (a).) Husband on appeal attacks the trial court's award pursuant to section 271 as potentially duplicative since the trial court referenced husband's conduct in setting the section 2030 award. Husband also asserts the section 271 award is unsupported by the record and the trial court's findings.

Section 271 directs the trial court, in making an award pursuant to that section, to consider "all evidence concerning the parties' incomes, assets, and liabilities." (§ 271, subd. (a).) Thus, as we have determined that this case must be remanded for a new determination as to husband's income or earning capacity, we must likewise reverse the section 271 award.

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[21] In light of our determination, we need not address the reasonableness of the trial court's attorney fees and costs awards or husband's ability to pay the amount awarded by the trial court.

V. Refusal to Reopen Evidence

Husband asserts that the trial court abused its discretion in denying his request to reopen evidence to present additional proof concerning the declining value of Rubin Orthopedics. In light of our determination to remand the matter for a new trial, husband's contention has been rendered moot.

VI. Denial of First Motion to Modify Support Obligation

As stated *ante*, by motion filed May 21, 2014, one week after the court issued its initial statement of decision, husband moved to modify his child and spousal support obligations. In an order dated September 16, 2014, the trial court, without holding an evidentiary hearing, denied husband's motion. In his appeal from this order, husband asserts that the denial of his motion without holding an evidentiary hearing deprived him of his right to due process. According to husband, he made a prima facie showing of changed circumstances, and, therefore, the trial court was required to hold an evidentiary hearing on the matter.

Our determination on husband's appeal from the judgment, inter alia, reversing the support orders, renders moot husband's appeal from the order denying his May 21, 2014, motion for a downward modification of those very support obligations, a possibility husband acknowledged in a letter brief he submitted in response to our request for supplemental briefing on a related issue. On the appeal from the judgment, we are reversing the underlying orders which husband sought to modify in his subsequent motion, and the effect of that reversal relates back to approximately eight months prior to the husband's motion. The most husband could obtain on his appeal from the order denying his motion is a remand for an evidentiary hearing on his motion; on the appeal from the judgment, we are ordering a new trial on the underlying support orders.

Accordingly, we conclude that husband's appeal from the order denying his May 21, 2014, motion for a downward modification has been rendered moot, and we dismiss that appeal.

DISPOSITION

The spousal and child support orders are reversed and the matter remanded for a new trial to determine husband's income or earning capacity, consistent with the principles expressed in this opinion. The attorney fees and costs award to wife is likewise reversed and remanded for a new trial to determine if and in what amount attorney fees and costs should be awarded. In all other respects, the judgment is affirmed. The appeal from the denial of husband's first motion to modify his support obligations is dismissed. Wife shall pay costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(1), (2).)

/s/
MURRAY, Acting P. J.

We concur:

/s/
DUARTE, J.

/s/
RENNER, J.